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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 816

BLANCHE PEEKE, Administratrix of the Estate of GEORGE DEWEY JENSIK, Deceased,
Petitioner,

vs.

ELLEN M. ENOCH and DAVID W. ENOCH,
Respondents.

BRIEF OF RESPONDENTS, ELLEN M. ENOCH AND DAVID W. ENOCH, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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March 13, 1963.

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INDEX.

	PAGE
Jurisdiction	1
Questions Presented	2
Statement	2
Reasons for Denying the Petition	4
1. The Decisions Below Are Adequately Supported by Independent Grounds Which Do Not Involve the Determination of a Federal Question So That No Question Is Presented for Review in This Court	4
2. Petitioner, Not Having Raised Any Constitutional Questions in the Trial Court, and Having Waived All Constitutional Questions by Appealing In the First Instance to the Appellate Court of Illinois, Rather Than to the Illinois Supreme Court, Has No Standing to Seek Review In This Court	9
Conclusion	13
Appendix	15
Illinois Probate Act	15
Illinois Evidence Act	16
Illinois Civil Practice Act	18
Illinois Supreme Court Rules, Rule 15	20

Citations.

Cases

In re Estate of Brauns, 330 Ill. App. 322, 324, 325 (First District, 1947) 5

Brinkerhoff—Faris Trust & Savings Company v. Hill, 281 U. S. 673, 680 (1930) 4, 9

The City of Edwardsville v. The Central Union Telephone Company, 302 Ill. 362, 364 (1922), 269 U. S. 190, 194-195 (1925) 11

Gratzius v. Armour and Company, 377 Ill. 447, 451 (1941) 10

Hulbert v. City of Chicago, 202 U. S. 275, 280 (1906) .. 10

In re Estate of Jensit, 34 Ill. App. 2d 130, 141 (First District, 1962) 7

McIlvaine v. The City National Bank, 371 Ill. 565, 569 (1939) 10

Myers v. Myers, 404 Ill. 606, 609 (1950) 10

The People v. Parker, 396 Ill. 583, 587 (1947), 333 U. S. 571, 573-575 (1948) 10, 11, 12

The People v. Rosenthal, 370 Ill. 244, 247 (1938) 10

The People v. Terrill, 362 Ill. 61, 62 (1935) 10

In re Estate of Schafer, 344 Ill. App. 608, 613 (Third District, 1951) 5

Shell Oil Company v. The Industrial Commission, 2 Ill. 2d 590, 601 (1954) 8

Shilvock v. The Retirement Board, 375 Ill. 68, 72 (1940) 10

United Gas Public Service Co. v. Texas, 303 U. S. 123, 139 (1938) 4, 8, 9

Statutes

Illinois Revised Statutes, 1961:
Ch. 3, Sec. 5 5
Ch. 3, Sec. 192 ..... 2, 7
Ch. 3, Sec. 196 5
Ch. 51, Sec. 2 ..... 6, 7
Ch. 110, Sec. 40 ..... 3, 5
Ch. 110, Sec. 57 3
Ch. 110, Sec. 75 ..... 10, 11

Court Rules

Illinois Supreme Court Rules, Rule 15 6

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BRIEF OF RESPONDENTS, ELLEN M. ENOCH AND DAVID W. ENOCH, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JURISDICTION

Petitioner seeks review in this Court under the provisions of Title 28 U.S.C. §1257(3). The provisions of this Section of Title 28 confer no jurisdiction upon this Court to grant review: (a) The decisions below did not depend upon the determination of a federal question, (b) petitioner neither presented nor argued in the trial court the alleged constitutional questions urged here as a basis for review nor were such alleged constitutional questions preserved in the record for review, and (c) any possible federal question arising out of the proceedings in the trial court was waived by petitioner, under the laws of the State of Illinois, when petitioner failed to appeal directly to the Supreme

Court of Illinois as is required under the laws of Illinois in all cases where constitutional questions are involved.

QUESTIONS PRESENTED.

1. Will this Court review decisions of state courts when it appears from the record that the decisions below are adequately supported by independent grounds which do not involve the determination of a federal question?

2. Has petitioner, not having raised any constitutional questions in the trial court, and having waived all constitutional questions by appealing in the first instance to the Appellate Court of Illinois, rather than to the Supreme Court of Illinois, any standing to seek certiorari in this Court?

STATEMENT.

Pursuant to the provisions of Section 192 of the Illinois Probate Act (Ill. Rev. Stat., 1961, Ch. 3, Sec. 192), respondents filed their verified Claim against the Estate of George Dewey Jensik, deceased, in the Probate Court of Cook County, Illinois, on August 11, 1959. The claim was for rentals under a lease of certain Kansas real estate owned by respondents. The lease was executed by respondents, as lessees, and in the name of Alcore Homes Incorporated, as lessor. Decedent, George Dewey Jensik, was one of the incorporators, a director and secretary-treasurer of Alcore Homes Incorporated. Decedent Jensik signed the lease in his capacity as secretary of Alcore Homes Incorporated. Decedent Jensik and the other incorporators of Alcore Homes Incorporated failed to comply with the Kansas statutes establishing the conditions precedent for the transaction of business as a corporation. The organization of the purported corporation was therefore never perfected and decedent Jensik remained personally liable for all obligations contracted in the name of the purported corporation.

On September 14, 1959, petitioner filed a "Motion to Strike and Dismiss the Statement of Claim of Ellen M. Knoch and David W. Knoch [sic] Herein," which was granted as to rentals accruing under the lease after the period of administration of decedent's Estate but denied as to rentals which accrued through the period of administration. Upon this disposition of her motion to strike and dismiss, petitioner obtained an order of the Probate Court allowing her thirty days within which to file an answer to the Claim. Pursuant to that order, petitioner filed a verified Answer and subsequently filed an Amendment to Answer. None of the facts alleged in the Claim were denied in petitioner's Answer or in her Amendment to Answer. Under the provisions of Section 40 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1961, Ch. 110, Sec. 40), all the facts alleged in the Claim were admitted by petitioner's failure to deny them in her Answer or in her Amendment to Answer.

Pursuant to motion and in accordance with the provisions of Section 57 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1961, Ch. 110, Sec. 57), respondents obtained summary judgment, in January, 1961, in the sum of $17,750.00 on their Claim in the Probate Court.

No affidavits were filed by respondents in support of their motion for summary judgment. No testimony was heard by the Probate Court. The Probate Court found that there was no disputed issue as to any material fact and consequently granted respondents' motion for summary judgment.

No constitutional question, involving either the state or federal constitution, was presented or preserved in the Probate Court. After the Appellate Court of Illinois had affirmed the summary judgment against her, petitioner for the first time attempted to raise a purported constitutional question in her Petition for Rehearing filed in the Appellate Court on March 17, 1962.

The facts pertinent to the merits of respondents' Claim are correctly set forth in the opinion of the Appellate Court of Illinois and are not repeated here since they are not relevant to the issues before this Court. For the same reason no effort has been made to correct the numerous inaccuracies and distortions in petitioner's Statement.

REASONS FOR DENYING THE PETITION.

1. The Decisions Below Are Adequately Supported by Independent Grounds Which Do Not Involve the Determination of a Federal Question So That No Question Is Presented for Review in This Court.

It is clearly established that state courts have supreme power to interpret written and unwritten laws of the state and that this Court will not decide local questions. *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 139 (1938); *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 680 (1930).

The first three of the "Questions Presented" to this Court by petitioner all involve the interpretation and application of statutes or rules enacted by or adopted in the State of Illinois. The decisions of the Illinois courts are binding upon this Court with respect to these questions of local law.

The first of the Questions Presented by petitioner is:

> "Whether, in the absence of any statute or rule or order requiring an administratrix to file an answer to a claim, and in the presence of an answer objecting to allowance of the claim limited to defenses going to the jurisdiction of the subject matter and in abatement, which did not, by statute, constitute an admission of the facts alleged in the claim, the Illinois courts had

> jurisdiction to enter a summary judgment against her on the claim on the ground she had admitted all allegations of material fact in the claim by her failure to deny them in the Answer."

This question relates exclusively to Illinois practice and procedure with respect to pleadings filed in the Probate Court. No federal question whatsoever is involved.

Section 196 of the Illinois Probate Act (Ill. Rev. Stat., 1961, Ch. 3, Sec. 196) authorizes the filing of an answer by an administrator. Petitioner filed an answer pursuant to an order of the Probate Court of Cook County *entered on her own motion.*

Section 5 of the Illinois Probate Act (Ill. Rev. Stat., 1961, Ch. 3, Sec. 5) makes the Illinois Civil Practice Act applicable to all proceedings in the Probate Court. Section 40 of the Illinois Civil Practice Act provides in part that "Every allegation, * * * not explicitly denied, is admitted, * * *." There was no contention by petitioner in the Probate Court that the provisions of Section 40 of the Illinois Civil Practice Act did not apply to the Answer and the Amendment to Answer which she filed.

The Appellate Court of Illinois correctly held, in accordance with Section 5 of the Illinois Probate Act, Section 40 of the Illinois Civil Practice Act and its own prior decisions, that the Illinois Civil Practice Act applies to claim pleadings and procedures in the Probate Court and that the petitioner had admitted all the facts alleged in respondents' Claim by her failure to deny them either in her Answer or in her Amendment to Answer. *In re Estate of Brauns*, 330 Ill. App. 322, 324, 325 (First District, 1947); *In re Estate of Schafer*, 344 Ill. App. 608, 613 (Third District, 1951).

The Appellate Court of Illinois likewise properly rejected petitioner's frivolous assertion that her Answer and

Amendment to Answer were limited to defenses to jurisdiction of the subject matter and in abatement.

The question presented with respect to the application of the relevant Illinois statutes to the Answer and Amendment to Answer filed by petitioner not only involves no federal question, it also ignores the actual facts both as to the applicable Illinois statutes and as to the Probate Court order which required petitioner to file an answer.

The second of the Questions Presented by petitioner is:

> "Whether, in the absence of any other testimony, when it affirmatively appears on the face of the record that the sworn answers of the claimants to interrogatories, propounded to them by an administratrix for discovery purposes only, relied on by them to prove their claim over the administratrix's protest, are such that, if they were sworn as witnesses, they could not testify competently thereto, the statutes providing that no party or person directly interested in the event thereof, shall be allowed to testify of his own motion, or in his own behalf, when any adverse party sues or defends as representative of a deceased or incompetent person, the Illinois courts had jurisdiction to enter a summary judgment against her on the ground they had proved all allegations of material fact in the claim by their testimony."

This question relates solely to the so-called "Dead Man's Act" of Illinois (Ill. Rev. Stat., 1961, Ch. 51, Sec. 2) and does not involve a federal question. Moreover, the Dead Man's Act has no application to this case as it, by its terms, is limited to *testimony* by a claimant in his own behalf. No testimony was offered in this proceeding. No affidavits in support of respondents' motion for summary judgment were filed so that, notwithstanding petitioner's assertions to the contrary, Rule 15 of the Rules of the Supreme Court of Illinois has no application to this proceeding. Again the Illinois courts were applying the laws of Illinois to this case.

The Appellate Court of Illinois correctly rejected petitioner's contention that the filing of a verified claim, in accordance with the requirements of Section 192 of the Illinois Probate Act, constituted either testimony in violation of the Dead Man's Act, or an affidavit in support of respondents' motion for summary judgment.

The answers to interrogatories of which petitioner now complains were to the extent that they related to matters which occurred prior to the death of decedent Jensik mere surplusage insofar as respondents were concerned and actually resulted in a $300.00 reduction in the amount of respondents' claim. Petitioner thus benefited from the Probate Court's consideration of respondents' answers to interrogatories propounded by her but has in no way been injured, nor was the Illinois Dead Man's Act violated by the Probate Court's reference to the answers to interrogatories.

The Appellate Court of Illinois properly held that "The administratrix admitted all material facts pleaded in the claim by her failure to deny them in her answer. No testimony was necessary to support the allegations of fact in the claim." *In re Estate of Jensik*, 34 Ill. App. 2d 130, 141 (First District, 1962).

No federal question whatsoever is involved in the second of the Questions Presented by petitioner.

The third of the Questions Presented by petitioner is:

> "Whether a summary judgment against an administratrix of the estate of a deceased officer and director of an insolvent corporation, or an apparently insolvent corporation, insolvent when the lease was entered into, or insolvent within thirty days thereafter, predicated on a lease providing that it shall terminate forthwith upon the insolvency of the corporation, under a statute providing that if a corporation has transacted any business before it is authorized to transact any business he shall be liable for the debts or liabilities of the corporation arising therefrom, has impaired the obligation of the lease that it shall terminate forthwith."

This so-called defense based upon the alleged insolvency of the purported corporation (Alcore Homes Incorporated) was raised by petitioner for the first time in the Appellate Court of Illinois and rejected by that court in accordance with the established rule in Illinois that a contention not urged below cannot be raised for the first time in an appellate court. *Shell Oil Company* v. *The Industrial Commission*, 2 Ill. 2d 590, 601 (1954). The alleged "proof" of corporate insolvency upon which petitioner relies consists of a series of contrived conclusions drawn by petitioner from frivolous assumptions based upon documents which were never admitted in evidence, which petitioner refused to admit were genuine (although they bore her deceased brother's signature) and which are not a part of the record which properly may be considered by this Court. Moreover, this contention of petitioner, based upon the alleged insolvency of the corporation, ignores the nature of this action. The gist of respondents' claim is that because the organization of the purported corporation was never completed, no corporation ever came into existence and decedent Jensik who clearly was *not* insolvent, therefore remained *personally* liable on the least in question. Obviously, the corporation would have had to come into existence before it *could* become insolvent.

It is obvious that no federal question (and, in fact, no legitimate *local* question) is involved in this phase of petitioner's contentions.

In *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 139 (1938) this Court said (303 U. S. at 139):

> "It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements."

In *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U. S. 673, 680 (1930) this Court said (281 U. S. at 680):

> "* * * the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State; * * * this Court's power to review decisions of state courts is limited to their decisions on federal questions; and * * * the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court."

Here, as in the *United Gas* case, the first three of the Questions Presented by petitioner are local questions, and the final judgments of the state courts "must be taken as determining that the procedure actually adopted satisfied all state requirements."

2. Petitioner, Not Having Raised Any Constitutional Questions in the Trial Court, and Having Waived All Constitutional Questions by Appealing In the First Instance to the Appellate Court of Illinois, Rather Than to the Illinois Supreme Court, Has No Standing to Seek Review In This Court.

The fourth of the Questions Presented by petitioner is:

> "Whether, regardless of the answer to be given to each of the preceding questions by this Court, the Illinois courts have, in entering and affirming a summary judgment against petitioner under the circumstances specified therein, and in dismissing a further appeal taken as a matter of right, deprived her and those she represents of their property without due process of state law, and have denied to them their day in court and the equal protection of state law, in violation of their Federal rights under the 14th Amendment, Section 1, to the Constitution of the United States."

The alleged constitutional questions urged here as a basis for review were never presented nor argued in the Probate Court nor were they preserved in the record for review. Petitioner attempted to raise a purported constitutional question *for the first time* in her Petition for Rehearing filed in the Appellate Court of Illinois on March 17, 1962, after the Appellate Court had affirmed the summary judgment entered on respondents' Claim by the Probate Court.

It is well established in Illinois that a question of the construction of the Constitution of the United States or of the Constitution of the State of Illinois must be alleged in the trial court and be decided by that court in order to give the Supreme Court of Illinois jurisdiction. *Myers* v. *Myers*, 404 Ill. 606, 609 (1950); *Grgetus* v. *Armour and Company*, 377 Ill. 447, 451 (1941); *Shilrock* v. *The Retirement Board*, 375 Ill. 68, 72 (1940); *McHugine* v. *The City National Bank*, 371 Ill. 565, 569 (1939). This rule of practice is well recognized by this Court. *Hulbert* v. *City of Chicago*, 202 U. S. 275, 280 (1906).

Section 75 of the Illinois Civil Practice Act (Ill. Rev. Stat., 1961, Ch. 110, Sec. 75) provides in part:

> "(1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved. . . ."

The rule in Illinois is that even if a constitutional question may have been raised by the pleadings or on trial, when the appellant takes his case first to the Appellate Court of Illinois rather than directly to the Illinois Supreme Court, he thereby waives any constitutional question. This rule applies even though the constitutional question is one involving the Constitution of the United States. *The People* v. *Parker*, 396 Ill. 583, 587 (1947), 333 U. S. 571, 573-575 (1948); *The People* v. *Rosenthal*, 370 Ill. 244, 247 (1938);

The People v. *Terrill*, 362 Ill. 61, 62 (1935); *The City of Edwardsville* v. *The Central Union Telephone Company*, 302 Ill. 362, 364 (1922), 269 U. S. 190, 194-195 (1925).

This Court considered the effect of a waiver of both federal and state constitutional questions under Section 75 of the Illinois Civil Practice Act in *Central Union Telephone Co.* v. *City of Edwardsville*, 269 U. S. 190, 194-195 (1925) and held that the doctrine of waiver under Illinois law was fair and reasonable and binding upon the Supreme Court of the United States. This Court, after quoting the then existing statute which later became Section 75 of the Illinois Civil Practice Act, said (269 U. S. at 194-195):

> "'The construction of this statute has been uniformly held to be, that where a question involves the Constitution, it must be taken on error or appeal to the Supreme Court, and that if it be taken to the Appellate Court on other grounds, the party taking the appeal or suing out the writ of error shall be held to have waived the constitutional questions. *Indiana Millers Ins. Co.* v. *People*, 170 Ill. 474; *Robson* v. *Doyle*, 191 Ill. 566; *Case* v. *Sullivan*, 222 Ill. 56; *Poe* v. *Ulrey*, 233 Ill. 56; *Haas Co.* v. *Amusement Co.*, 236 Ill. 452; *Scott* v. *Artman*, 237 Ill. 394; *Comm'rs* v. *Shockey*, 238 Ill. 237.'
>
> * * * * *
>
> "It seems to us that the practice under the statute of Illinois above quoted is entirely fair. If the litigant has a constitutional question, federal or state, he may take the case directly to the Supreme Court and have that question decided, together with all the other questions in the case, and then, if the federal constitutional question is decided against him, he may bring it here by writ of error or application for certiorari. If he elects to take his case to the Appellate Court, he may have the non-constitutional questions considered and decided, but he gives up the right to raise constitutional objections in any court."

This Court expressly adhered to its decision in the *Central Union Telephone Co.* case in *Parker* v. *Illinois*, 333

U. S. 571, 573-575 (1948). In *Parker*, the Court first noted (333 U. S. at 573):

> "* * * it is well-settled law in Illinois that if an appellant takes his case to the Appellate Court where errors are assigned of which that court has jurisdiction, he is deemed to have waived any constitutional questions. *People* v. *Rosenthal*, 370 Ill. 244, 247, 18 N. E. 2d 450, 452; *People* v. *McDonnell*, 377 Ill. 568, 569, 37 N. E. 2d 159, 160."

The Court went on to say (333 U. S. at 574-575):

> "This Court held in *Central Union Co.* v. *Edwardsville*, 269 U. S. 190, that federal constitutional questions which Illinois held had been waived for failure to follow its procedure would not be entertained here. The nature of the questions presented in the present case seemed to us to warrant a grant of the petition for writ of certiorari to determine whether the rule of the *Edwardsville* case was applicable to the peculiar circumstances presented here.
>
> "When federal rights are involved, it is, of course, for this Court finally to determine whether the failure to follow the procedure designed by a State for their protection constitutes a waiver of them. *Davis* v. *O'Hara*, 266 U. S. 314; *Central Union Co.* v. *Edwardsville*, *supra*. The Court said in the *Edwardsville* case that when the waiver is founded on a failure to comply with the appellate practice of a State, the question turns on whether that practice gives litigants 'a reasonable opportunity to have the issue as to the claimed right heard and determined' by the state court. 269 U. S., pp. 194-195. It was there held that the Illinois practice of requiring constitutional questions to be taken directly to the Illinois Supreme Court and of refusing to review them if review was first sought in the Appellate Court satisfied the requirement. We adhere to that decision. The channel through which the constitutional questions raised by petitioner in his attack on the amended order, could have been taken all the way to this Court was not only clearly marked; it was also open and unobstructed."

Petitioner has cited no authority whatsoever to support her right to review of this case by this Court. The Probate Court of Cook County had jurisdiction of the subject matter and of the parties. It had the power, under the Illinois Civil Practice Act, to grant summary judgment where there was no disputed issue as to any material fact. Petitioner's real complaint is that she objects to the application of the Illinois Civil Practice Act to the pleadings which she filed. This is a matter of local law not subject to review by this Court. The record itself is a complete answer to petitioner's suggestion that she has been denied her "day in court."

CONCLUSION.

It is respectfully submitted that the decisions below are adequately supported by independent grounds which do not involve the determination of a federal question; that the interpretation of the Illinois statutes and court rules by the courts of Illinois constitutes a determination of questions of local law which is not subject to review by this Court; that petitioner neither presented nor argued in the trial court the alleged constitutional questions urged here as a basis for review; that the petitioner waived all constitutional questions by her appeal to the Appellate Court of Illinois, rather than to the Illinois Supreme Court; and that the petition for writ of certiorari should therefore be denied.

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March 13, 1963.

APPENDIX.

ILLINOIS PROBATE ACT.

Ill. Rev. Stat., 1961, Chapter 3.

§ 5. Civil Practice Act to Apply.) The provisions of the Civil Practice Act and all existing and future amendments and modifications thereof, and the rules now or hereafter adopted pursuant to that Act, shall apply to all proceedings hereunder, except as otherwise provided in this Act. Matters not germane to the distinctive purpose of the proceeding shall not be introduced by joinder, counterclaim, or otherwise. The provisions of paragraph 8 of Section 50 of the Civil Practice Act, and all existing and future amendments and modifications of paragraph 8, shall not apply to those proceedings filed under Sections 224, 225, 270, and 271 of this Act for the sale or mortgage of real estate or an interest therein. As amended by act approved July 6, 1953. L. 1953, p. 836.

§ 192. Filing of Claims—Form.) A claim against the estate of a decedent, a minor, or an incompetent may be filed in the probate court having jurisdiction of the estate. Every claim filed shall state the nature of the claim and shall be accompanied by an affidavit of the claimant or any person having knowledge of the facts that the claim is just and unpaid after allowing all just credits, deductions and setoffs. As amended by act filed July 21, 1941. L. 1941, vol. 1, p. 1.

§ 196. Pleadings.) The executor, administrator, guardian, or conservator or any other person whose rights may be affected by the allowance of a claim may file pleadings with the clerk of the court. A claim or counterclaim may be

filed in favor of the estate and against any claimant named in the claim. The time for filing pleadings is as follows:

(a) When a claim against the estate of a decedent is filed on or before the claim date, within 15 days after the claim date;

(b) When process is waived on a claim, within 15 days after the first Monday of the next month following the month in which the claim is filed;

(c) When summons is issued on a claim, 30 days after the service of summons, exclusive of the day of service.

The court may permit the filing of pleadings at any time before judgment on a claim or counterclaim. As amended by act approved July 6, 1955. L. 1955, p. 968, effective Jan. 1, 1956; act approved July 19, 1955. L. 1955, p. 2233, effective Jan. 1, 1956.

ILLINOIS EVIDENCE ACT

Ill. Rev. Stat., 1961, Chapter 51.

When not competent—Exceptions.] § 2. No party to any civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the trustee or conservator of any habitual drunkard, or person who is mentally ill or mentally deficient, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

First—In any such action, suit or proceeding, a party or interested person may testify to facts occurring after the death of such deceased person, or after the ward, heir, legatee or devisee shall have attained his or her majority.

Second—When, in such action, suit or proceeding, any agent of any deceased person shall, in behalf of any person or persons suing or being sued, in either of the capacities above named, testify to any conversation or transaction between such agent and the opposite party or party in interest, such opposite party or party in interest may testify concerning the same conversation or transaction.

Third—Where, in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any person having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or party in interest, then such opposite party or party in interest shall also be permitted to testify as to the same conversation or transaction.

Fourth—Where, in any such action, suit or proceeding, any witness, not a party to the record, or not a party in interest, or not an agent of such deceased person, shall, in behalf of any party to such action, suit or proceeding, testify to any conversation or admission by any adverse party or party in interest, occurring before the death and in the absence of such deceased person, such adverse party or party in interest may also testify as to the same admission or conversation.

Fifth—When, in any such action, suit or proceeding, the deposition of such deceased person shall be read in evidence at the trial, any adverse party or party in interest may testify as to all matters and things testified to in such deposition by such deceased person, and not excluded for irrelevancy or incompetency. As amended by act approved July 16, 1951, L. 1951, p. 1559.

ILLINOIS CIVIL PRACTICE ACT

Ill. Rev. Stat., 1961, Chapter 110.

§ 40. Pleadings to be specific. (1) General issues shall not be employed. Every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates.

(2) Every allegation, except allegations of damages, not explicitly denied is admitted, unless the party states in his pleading that he has no knowledge thereof sufficient to form a belief, and attaches an affidavit of the truth of the statement of want of knowledge, or unless the party has had no opportunity to deny.

(3) Denials must not be evasive, but must fairly answer the substance of the allegation denied.

(4) If a party wishes to raise an issue as to the amount of damages only, he may do so by stating in his pleading that he desires to contest only the amount of the damages. As amended by act approved July 19, 1955. L. 1955, p. 2238.

§ 57. Summary judgments and decrees. (1) For plaintiff. Any time after the opposite party has appeared or after the time within which he is required to appear has expired, a plaintiff may move with or without supporting affidavits for a summary judgment or decree in his favor for all or any part of the relief sought.

(2) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment or decree in his favor as to all or any part of the relief sought against him.

(3) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counteraffidavits. The judgment or decree sought shall be rendered forthwith

if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree as a matter of law. A summary judgment or decree, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(4) Form of affidavits. The form and contents of and procedure relating to affidavits under this section shall be as provided by rule.

(5) Affidavits made in bad faith. If it appears to the satisfaction of the court at any time that any affidavit presented pursuant to this section is presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing it to pay to the other party the amount of the reasonable expenses which the filing of the affidavit caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. As amended by act approved July 19, 1955. L. 1955, p. 2238.

§ 75. Jurisdiction of Appellate and Supreme Courts. (1) Appeals shall be taken directly to the Supreme Court (a) in all cases in which a franchise or freehold or the validity of a statute or a construction of the constitution is involved, (b) in all cases relating to revenue, or in which the State is interested as a party or otherwise and (c) in cases in which the validity of a municipal ordinance or county zoning or ordinance or resolution is involved and in which the trial judge certifies that in his opinion the public interest so requires. * * *

ILLINOIS SUPREME COURT RULES.

Rule 15.

Affidavits in Proceedings for Summary Judgment or Decree and Under Section 48. (1) Affidavits in support of and in opposition to a motion for summary judgment or decree, and affidavits under section 48 of the Civil Practice Act, shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim or defense is based; shall have attached thereto sworn or certified copies of all papers upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto. If all of the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used.

(2) If the affidavit of either party contains a statement that any of the material facts which ought to appear in the affidavit are known only to persons whose affidavits affiant is unable to procure, by reason of hostility or otherwise, naming the persons and showing why their affidavits cannot be procured, and what affiant believes they would testify to if sworn, with his reasons for his belief, the court may make any order that may be just, either granting or refusing the motion, or granting a continuance to permit affidavits to be obtained, or for submitting interrogatories to or taking the depositions of any of the persons so named, or for producing papers or documents in the possession of those persons or furnishing sworn copies thereof. The interrogatories and sworn answers thereto, depositions so taken, and sworn copies of papers and documents so furnished, shall be considered with the affidavits in passing upon the motion.